Supreme Court, U.S.
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No. 90-1798

In the Supreme Court of the United States

OCTOBER TERM, 1991

RAYMOND A. EBANKS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court failed to make adequate findings of fact in calculating the amount of drugs petitioner possessed for the purpose of determining his offense level under the Sentencing Guidelines.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-25) is reported at 924 F.2d 753.

JURISDICTION

The judgment of the court of appeals was entered on January 25, 1991. A petition for rehearing was denied on March 22, 1991. Pet. App. 26. The petition for a writ of certiorari was filed on May 22, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of Missouri, petitioner was con-

victed on one count of conspiracy to distribute cocaine base, in violation of 21 U.S.C. 846. He was sentenced to 22 years' imprisonment. The court of appeals affirmed. Pet. App. 1-25.

1. Petitioner was a member of a crack cocaine distribution ring that operated in the Kansas City, Missouri, area in 1987 and 1988. The evidence at trial showed that the group distributed "significant quantities of cocaine base," Pet. App. 6, and that its cash receipts ranged from "$10,000 to $15,000 daily, involving trash bags full of money," *id.* at 4. The government also presented evidence of undercover cocaine base purchases and seizures of drugs and cash from "crack houses" operated by the drug organization, *id.* at 4-6, as well as the price that petitioner and his co-conspirators typically charged for their drugs, *id.* at 23.

The presentence report calculated petitioner's offense level under the Sentencing Guidelines by estimating that a total of at least 1,173 grams of cocaine base had been involved in the conspiracy. That amount included cocaine base purchased or seized by the authorities during the course of the conspiracy, as well as the amount of cocaine base that the conspirators must have distributed in order to have earned the amount of money seized from them. Gov't C.A. Br. 29, 73; Pet. App. 24.

The district court adopted the presentence report as its findings of fact. The court stated that it found "a clear and convincing showing that more than 500 grams of cocaine base were sold by" petitioner and his co-conspirators. Judgment at 2. Accordingly, the court sentenced petitioner at the offense level that governs 500 grams or more of cocaine base. Pet. App. 23-25. Had the court considered only the seized and purchased drugs themselves, which weighed less than 500 grams, and not the amount of drugs necessary to generate the cash that was seized, petitioner would have received a shorter sentence than he did under the district

court's finding that the conspiracy had distributed more than 500 grams of crack cocaine.

2. Petitioner claimed on appeal that, in determining the offense level, the district court should not have based the amount of drugs involved in the conspiracy on the amount of cash seized. Pet. App. 24. The court of appeals rejected that claim, holding that the district court's method of calculating the amount of drugs involved in petitioner's offense was permissible under the commentary to Sentencing Guidelines § 2D1.4, which covers drug conspiracies and provides that when the amount of drugs seized "does not reflect the scale of the offense, the sentencing judge shall approximate the quantity of the controlled substance." Pet. App. 24-25 (quoting Guidelines § 2D1.4, Application Note 2). That commentary, the court observed, "although not binding, is persuasive." Pet. App. 25. The court concluded that it was required to "accept the district court's findings of fact in the sentencing proceeding unless they are clearly erroneous," and held that the district court had correctly found that the quantity of cocaine base involved in the conspiracy exceeded 500 grams. *Ibid.*

ARGUMENT

Petitioner principally contends (Pet. 6-9) that the commentary to Section 2D1.4 of the Sentencing Guidelines required the district court to make explicit factual findings that the amount of drugs seized from petitioner's drug distribution organization did not reflect the scale of the offense and that the cash seized was derived from the sale of drugs.

The commentary to Guidelines § 2D1.4 requires the sentencing court to approximate the amount of drugs involved in the offense when, as in this case, the quantity of drugs seized does not adequately reflect the scale of the con-

spiracy. In making this approximation, the sentencing court may consider, among other factors, the amount of money the defendant obtained through drug transactions. See Guidelines § 2D1.4, Application Note 2 (to determine quantity of controlled substance involved in offense, district court may consider "the price generally obtained for the controlled substance"). Nothing in the Sentencing Guidelines or their commentary requires the court to make an explicit finding that the amount of drugs seized fails to reflect the scope of the conspiracy or that cash seized from the defendant is derived from drug transactions.

Nonetheless, the district court adopted the factual conclusions of the presentence report and found that the government had made "a clear and convincing showing that more than 500 grams of cocaine base" had been distributed by petitioner's drug ring. Judgment at 2. By adopting the presentence report, which calculated the amount of cocaine base that was equivalent to the cash seized from the conspirators, Pet. 3-4, the district court in effect found that the drug/money equivalency calculation was correct and appropriate in this case. Furthermore, by finding "clear and convincing" evidence that the drug scheme distributed more than 500 grams of cocaine base, the district court necessarily found that the amount of cocaine base actually seized did not reflect the scope of the conspiracy, and that the cash seized from the conspirators was the fruit of illegal drug transactions. See *United States* v. *Perrera*, 842 F.2d 73, 75-76 (4th Cir.) (when viewed in context of court's remarks at sentencing, its adoption of facts from presentence report constituted adequate findings), cert. denied, 488 U.S. 837 (1988); *United States* v. *Gerante*, 891 F.2d 364, 367 (1st Cir. 1989) (by accepting government's recommended base offense level, district court "implicitly" found that cash discovered

in defendant's residence was derived from drug transaction).[1] While more precise factual findings would have been helpful, under the circumstances of this case the district court's findings were adequate.[2]

The district court could hardly have found on this record that the relatively small amount of seized drugs reflected the scope of the conspiracy involved in this case. Rather, as the court of appeals noted, "substantial evidence" in the record showed that the drug ring distributed "significant quantities of cocaine base," Pet. App. 6, and at the height of the conspiracy its cash receipts were "in the range of $10,000 to $15,000 daily," *id.* at 4. The evidence before the district court therefore supported the court's finding that petitioner distributed at least the 1,173 grams of crack cocaine for which he was sentenced.

Petitioner also contends (Pet. 8) that the court of appeals' statement that the commentary to the Sentencing Guidelines

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[1] Petitioner's reliance (Pet. 7) on *United States* v. *Turner*, 898 F.2d 705 (9th Cir. 1990), and *United States* v. *Warters*, 885 F.2d 1266 (5th Cir. 1989), is misplaced. In *Turner*, the defendant's presentence report indicated that he had withdrawn from a conspiracy before the drugs upon which his sentence was based had been seized. The district court thus failed to make any finding of fact, explicit or implicit, that those drugs were sold in furtherance of petitioner's participation in the conspiracy, and in fact the evidence supported the opposite conclusion. In *Warters*, the district court departed upward from the Guidelines range without making any findings that the defendant's actions warranted enhancement of his sentence. The Sentencing Guidelines require that the court make factual findings before it may depart from the Guidelines. See Guidelines § 5K2.0; 18 U.S.C. 3553(b).

[2] Petitioner notes (Pet. 7) that Fed. R. Crim. P. 32(c)(3)(D) requires the sentencing court to resolve disputes as to the factual accuracy of the presentence report. By adopting the conclusions of the presentence report as its findings of fact, and by finding further that the evidence clearly showed distribution of more than 500 grams of cocaine base, the district court resolved any factual dispute on that issue.

is "persuasive" but not "binding" conflicts with decisions of other circuits that have considered the weight to be given to that commentary. That argument is without merit, however, for although the cases cited by petitioner recognize, as does this one, the importance of the commentary in interpreting the Guidelines, none of them holds that the commentary is binding upon the courts. See *United States* v. *Metcalf*, 898 F.2d 43, 46 n.6 (5th Cir. 1990) (court "will accord respect" to application note in construing Guidelines); *United States* v. *Rutter*, 897 F.2d 1558, 1561 (10th Cir. 1990) (commentary is "essential in correctly interpreting and uniformly applying" Guidelines); *United States* v. *Gross*, 897 F.2d 414, 416-417 (9th Cir. 1990) ("application notes are not binding law, they are only advisory commentary to assist in the application of the statute"); *United States* v. *Ofchinick*, 877 F.2d 251, 256-257 (3d Cir. 1989) (commentary "may be used to 'interpret the guideline or explain how it is to be applied' ") (quoting Guidelines § 1B1.7). All of those cases are consistent with the court of appeals' decision in this case, which also accorded deference to the commentary in interpreting the Guidelines.

Even if a conflict existed, review would not be appropriate in this case for two reasons. First, the question whether courts are obliged to follow the commentary in applying the Sentencing Guidelines is not presented here. As petitioner acknowledges (Pet. 8), although the court of appeals stated that the commentary was not binding authority, it "strictly adhered" to the commentary in applying the Guidelines. Because the Court determined to follow the commentary, its conclusion as to the weight of the commentary is dictum. Second, the task of determining the proper application of the Guidelines' commentary is better left to the Sentencing Commission, which has the duty to review and revise the Guidelines where appropriate. The Commission's regular revision of the Guidelines and the

accompanying commentary eliminates any need for this Court to use its certiorari discretion to resolve an issue of the sort presented here. See *Braxton* v. *United States*, 111 S. Ct. 1854, 1857-1858 (1991).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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